

Testimony before the

COMMITTEE ON FINANCIAL SERVICES

Subcommittee on Domestic Monetary Policy, Technology and Economic Growth

regarding the

Consumer Consent Provisions

in the

Electronic Signatures in Global and National Commerce Act (E-Sign)

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Mr. Chairman and Members of the Committee, the **National Consumer Law Center**¹ thanks you for inviting us to testify today regarding the consumer consent provisions in the Electronic Signatures in Global and National Commerce Act (E-Sign).² We offer our testimony here today on behalf of our low income clients, as well as the **Consumer Federation of America**, **Consumers Union**, and the **U.S. Public Interest Research Group**.³ Our testimony is offered in strong support of the need for retaining the consumer consent provisions in E-Sign.

E-Sign required the FTC and the Department of Commerce to evaluate whether the benefits to consumers from the requirement for electronic consent in E-Sign⁴ *outweigh* the burdens. On behalf of the millions of low and moderate income consumers that we represent, we can categorically state that there are substantial benefits to consumers, and minimal burdens to industry. The electronic consent protects consumers in both the off-line world,

¹The **National Consumer Law Center** is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen examples of predatory practices against low-income people in almost every state in the union. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. We have led the effort to ensure that electronic transactions subject to both federal and state laws provide an appropriate level of consumer protections. We publish and annually supplement twelve practice treatises which describe the law currently applicable to all types of consumer transactions.

² Federal Electronic Signatures in Global and National Commerce Act, Pub. L No. 106-229, 114 Stat. 464 (2000) (codified as 15 U.S.C. §§ 7001-7006, 7021, 7031) (enacted S. 761).

³The **Consumer Federation of America** is a nonprofit association of over 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

Consumers Union is the publisher of Consumer Reports.

The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

⁴ E-Sign requires that for consumers before

(c)(1) . . . the use of an electronic record to provide . . . information such
information satisfies the requirement that such information be in writing if –

(C) the consumer – . . .

(ii) consents electronically, or confirms his
or her consent electronically, in a manner
that reasonably demonstrates that the
consumer can access information in the
electronic form that will be used to provide
the information that is the subject of the
consent.

(15 U.S.C. § 7001(c)(1)(C)(ii))

as well as the on-line world. The provisions protect consumers from mistakenly agreeing to electronic records, or as part of a form contract. They protect consumers from mistakenly agreeing to receive electronic records in a form that they are not able to access and retain. And these provisions protect consumers from fraudulent practices which might otherwise be facilitated by the laws like E-Sign, which are designed only to expedite the transition to an electronic marketplace.

We believe that once access to the Internet is more widely available to all Americans, especially the nation's poor and elderly, there may be many new and beneficial opportunities made available. However, policies to facilitate electronic commerce must assure that consumers who are looking for credit, goods and services both through the Internet *and in the physical world* will not be victimized by overreaching merchants of goods and services.

Encouraging electronic commerce and protecting consumers need not be competing goals. The key to facilitating electronic commerce while protecting consumers' interests is to ensure that all of the assumed elements to a transaction in the physical world are in existence in electronic commerce, and that e-commerce not be the excuse for reducing consumer protections in real world transactions.

In these comments we address:

- I. The three distinct benefits of the electronic consent requirement.
- II. The current and future effect of the consumer consent provisions of E-Sign.
- III. The need to protect consumers, and the benefits of the consumer consent provisions, with particular focus on special issues facing consumers in the new world of electronic commerce:
 - a. The necessity to protect consumers *who are conducting real world transactions* from unfair or fraudulent practices which may be facilitated by E-Sign or other laws designed to expedite e-commerce.
 - b. The importance of protecting consumers who are conducting business on line *using a public access computer*.
 - c. The risks that consumers face when relying on electronic transmission of important notices.
- IV. Discussion of the confusing status of E-Sign's provisions in the states.
- V. The effect of the differences between *electronic* delivery and *paper* delivery on electronic records.
- VI. Recommendations to improve protection of consumers from risks imposed by electronic exchanges.

I. The three distinct benefits of the *electronic* consent requirement.

The electronic consent requirement was included in the E-Sign legislation to protect consumers in a number of ways. Clearly, one reason was to protect consumers from the use of electronic commerce to facilitate fraud on consumers. However, it is clear from the Congressional record that the electronic consent is also to create a type of electronic handshake between the parties – a means to ensure that the electronic communication will in fact be successful. It is also apparent that the electronic consent is meant to emphasize to the parties to significance of the agreement to receive records electronically.

The three, distinct, but related protections afforded by the requirement for a consumer to *electronically* consent are:

- To ensure that the consumer has reasonable access to a computer and the Internet to be able to access information provided electronically.
- To ensure that the consumer's means of access to electronically provided information includes the software to read the electronic records provided.
- To underscore to the consumer the fact that by electronically consenting, the consumer is agreeing to receive the described information electronically in the future.

Senator Leahy emphasized these differences when he said on the floor of the Senate, regarding the passage of E-Sign:

[This bill] avoids facilitating predatory or unlawful practices. . . . {It} will ensure informed and effective consumer consent to replacement of paper notices and disclosures with electronic notices and disclosures, so that consumers are not forced or tricked into receiving notices and disclosures in an electronic form that they cannot access or decipher.

. . . I maintained that any standard for affirmative consent must require consumers to consent electronically to the provision of electronic notices and disclosures in a manner that verified the consumer's capacity to access the information in the form in which it would be sent. *Such a mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating e-mail address and the other technical means for access the information.* (Emphasis added)⁵

II. The Current and Future Effect of the Consumer Consent Provisions of E-sign

The internet has considerably broadened the power of consumers to access information and to comparison shop for goods and services. In many instances, purchases made over the internet are less expensive than would be available to consumers shopping in the real world. There are clear, undeniable benefits to consumers from engaging in e-commerce. However, it should be kept in mind that consumers' confidence in their own privacy and in their financial security is also essential for an active consumer marketplace to thrive.

Indeed, laws pre-dating E-Sign provide consumer protections which have allowed e-commerce to thrive. *But for the substantial consumer protections provided by the Truth in Lending Act for credit card purchases, e-commerce would not have flourished as it has* ⁶ *in the past decade.* When purchases are made over the Internet, they are generally paid for with a credit card. Payment by credit card provides a wide array of consumer protections mandated by the Truth in Lending Act,⁷ ensuring – among other things – that the consumer is not billed for items not ordered, or not received, or not as warranted. In the less typical situation of a consumer using a debit card to

⁵146 Cong. Rec. S5219-5222 (daily ed. June 15, 2000) (statement of Sen. Leahy).

⁶ Compare the explosive use of electronic commerce for the purchasing of goods in the U.S. to the paltry amount in Europe. Undeniably the difference is in the protections afforded the American consumer when they use credit cards to pay for their purchases on-line.

⁷15 U.S.C. §1601 *et seq.*; see §§ 1642, 1643, 1644, 1666.

make a purchase, the protections against unauthorized use provided by the Electronic Fund Transfers Act⁸ apply.

To date, we do not believe that the provisions of the consumer consent provisions of E-Sign have been used for many contractual arrangements over the net. To the extent that the consumer consent provisions of E-Sign have been implicated since its passage, it has generally been in the areas of electronic banking and provision of information relating to securities. In other words, most transactions which are required to be in writing are *still being conducted on paper* rather than electronically. Industry may say that this is because the consumer consent provisions of E-Sign are too onerous. Actually, the news reports indicate that there are other, more technical problems that must be ironed out before business is conducted entirely electronically.⁹ The passage of E-Sign, as well as the passage by many states of the Uniform Electronic Transactions Act, has *established the legal authority for electronic records and signatures*. But these laws have not provided the participants in e-commerce with necessary assurances. The big questions of 1) how to authenticate the players on-line, and 2) how to ensure that the electronic records have reasonable integrity against alteration, remain unanswered.

Before the next big step is made in e-commerce, both business and consumers must be assured that they will be reasonably protected from losses. The issue for the regulators is to ensure that the protections afforded consumers will be meaningful and enforceable. While we believe that, due to unrelated technological shortcomings, few transactions have been undertaken with the consumer consent provisions of E-sign in the few months since the statute's enactment, those protections will be highly important as a predicate for the future growth of e-commerce.

III. The Benefits of the Consumer Consent Provisions Far Outweigh the Minimal Burden

Significance of Using Electronic Records to Replace Paper. An important complexity in the analysis of the need for the consumer electronic consent provisions of E-Sign is the fact that the law applies to situations and transactions which are entirely *non-electronic*. If this were not the case, our concerns would be considerably different. But, E-Sign does not limit its application to transactions conducted between parties who are both on-line. This means that consumers who are standing in a place of business may be asked to agree to receive important documents electronically. They may be asked to agree to receive electronic records immediately – relating to the transaction taking place in the store, or they may be asked to receive electronic records in the future – relating to an ongoing relationship between themselves and the business.

E-Sign allows an electronic record to satisfy a legal requirement for a writing. Generally when the law requires that a notice or a contract be provided in writing to a consumer there has been a recognition that the consumer needs to receive the information in the record in a form the consumer can *access* and can *keep*. State and federal requirements that certain information be given to consumers in writing have been adopted only after a finding of a pattern of harm to consumers when that information is *not* delivered in writing. Required paper notices and documents are critically important to ensure that consumers are informed of their rights and obligations, and have the proof of the terms of their contracts to enforce these rights in court.

E-Sign allows electronic records to replace paper. But the differences between the physical world and the electronic world must be recognized. For example, when a law requires a document to be in writing there are a number of inherent assumptions that automatically apply to that writing that are not necessarily applicable to an electronic record:

⁸ 15 U.S.C. § 1693 see § 1693g.

⁹ See, e.g. Tom Fernandez, The American Banker, *E-Signature Law Proves Tough to Put into Practice*, March 13, 2001.

- A piece of paper handed to or mailed to a person can be read without any special equipment.

A computer is required to access or read an electronic record.

- A written record can be received by the consumer at no cost to the consumer. The consumer pays nothing to maintain and open the mailbox to which the U.S. Post delivers the mail daily.

The electronic record can only be accessed through a computer connected to a third party for whom payment is generally required on an ongoing basis – the Internet Service Provider, or ISP.

- If the consumer moves, U.S. Postal mail can be easily forwarded, at no cost to the consumer and with minimal difficulty – one notice to the Post Office suffices to forward all incoming mail for a year.

ISPs generally do not forward electronic mail. Occasionally electronic mail will bounce back as undeliverable to the sender, but this is not automatic and not universal.

- A paper writing does not require special equipment to hold on to, or to retain. A consumer need only put it in the drawer, or in a file, where it will remain until the consumer removes it.

An electronic record can only be retained electronically. The consumer must have access to a computer with a hard disc to retain the record,¹⁰ or access to a computer with a printer to retain a printed copy of the electronic record (although the printed copy may not be useful to prove the terms of the electronic record in court unless the paper representation of the electronic record includes some means of verifying that it is a true reflection of the actual electronic record received by the consumer.)

- A paper writing is by its nature tangible. Once handed to, or mailed, to a person it will stay on the table or in the drawer, wherever the consumer put it, until it is thrown out by the consumer.

An electronic record can be provided in a form which will disappear after a period of time determined by the provider of the record. For example, E-Sign contemplates that a consumer could be provided notice of important information by providing a web-link to an internet posting. If the consumer does not access the internet web-link in time, the electronic record may no longer be there.

- The printed matter on the paper writing will not change every time someone looks at it, and the paper writing can be used at a later date to prove its contents in a court.

The electronic record could be provided in a format which is not retainable by the consumer. And, even if the consumer is able to access and retain the electronic record, the record may not be printable in the same format in which it was viewed. To provide the same level of integrity to an electronic record that exists naturally with a paper writing, a special effort must be made: the electronic record must be deliberately preserved in a particular *locked* format (Adobe, XML, etc.) to prevent alterations by mistake or deliberately every time the document is read.

¹⁰ It is conceivable that the consumer without regular access to a computer with a hard disc could use a floppy disc or a CD to retain important electronic records. But this requires access to a computer on which to download the records on to the floppy when they are received, and access to a computer with similar capabilities to access the electronic records at a later time when they are needed.

These are a lot of differences between paper writings and electronic records. One significant difference is that it *takes money to access and retain electronic records in a useable format*. It does not take money to access and keep and use the same information in a paper format. As the Department of Commerce's excellent report on the Digital Divide indicates, the majority of households are still not connected electronically.¹¹

- The majority of Americans have no access to the Internet in their homes or *elsewhere* – over 55%.
- Only 41.5% of all households can access the Internet from their home.¹²
- Over 8% of Americans rely on public access, their employer's, or another person's computer.¹³
- The percentages of elderly and the poor who do not have access to computers are much higher.¹⁴

While we want to encourage and facilitate electronic commerce, we must remember that a majority of Americans are still not connected to the Internet, at home, at work, or in a public place. Only access at home can be considered a reliable method of receiving personal information. Use of a computer at work is frowned upon or considered grounds for disciplinary action by many employers. Public access computers have extensive waiting times and limitations on use.

Moreover, even as Internet access continues to expand, people continue dropping their Internet service as well. The latest report on the Digital Divide indicates that each year over 4 million households have dropped their electronic access.¹⁵ This is a significant figure, especially when measured against the total number of households that are on line -- 43.6 million,¹⁶ and only a portion of these use the Internet from their homes. This is a **drop off rate of over 10% a year**.¹⁷ The message here, unfortunately, is that even as more households rush to obtain Internet access, a significant number are dropping off that access.

While e-commerce has great potential, the differences between paper documents and electronic documents, and the gap in Internet access, invite exploitation by fraudulent marketers. There are numerous scenarios which describe the dangers presented to consumers by E-Sign. Below, we set out a few to illustrate the reasons why the electronic consumer consent provision in E-Sign is so important to protect consumers:

- a. **Danger – Use of electronic records as a method of avoiding providing information to a consumer who lacks access to the Internet.** An elderly woman is visited at home by a home improvement salesman who talks her into taking out a home equity loan to pay for an overpriced home improvement. The salesman has the

¹¹ U.S. Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, *"Falling Through the Net: Toward Digital Inclusion" A Report on Americans' Access to Technology Tools*, October, 2000. Figure II-13.

¹² *Id.* in Executive Summary.

¹³ *Id.* in Figure II-13.

¹⁴ *Id.* in Executive Summary.

¹⁵ *Id.* in text accompanying Figure I-18.

¹⁶ *Id.* in Part One -- Overall Household Findings.

¹⁷ Actually, if one compares the drop off rate in the year 2000 to the number of households which were on line during the previous year, which may be the better comparison, this ratio will be higher. However, we do not have the number of households which had Internet access the previous year, only the percentage.

woman sign various papers that include a statement that she agrees **to receive all notices and disclosures on line**. She also signs an acknowledgment that various disclosures required by state and federal law have been provided to her electronically, and indeed the salesman has posted these documents on a website or sent them to an email address he has set up for her. However, the woman has no home computer and no knowledge of how or where she can access a computer. She might even be home bound or disabled.

Federal and state consumer laws require that the documents relating to the transaction be provided to the woman in writing. This writing requirement is some assurance the consumer will be apprized of the following important information:

- the terms of the sales and financing contract (Retail Installment Sales Contract)
- the cost and the monthly payments for the mortgage taken out on her house (Truth in Lending Disclosures)
- the consumer's right to cancel the transaction within three days (FTC Door to Door Sales Rule).

The requirement that this important information be provided in writing also ensures that the home improvement salesman cannot alter the terms of the contract after she has signed it. The writing requirement also provides this consumer with a chance to review the documents, or get help to review them, and cancel the loan within a certain period of time.

E-Sign's requirement for consumer electronic consent provision addresses these issues, albeit imperfectly. A comparison with what can happen under the provisions of the Uniform Electronic Transactions Act (UETA)¹⁸ is relevant, because UETA does not require electronic consent. Under UETA, a consumer who does not own a computer *could sign a piece of paper* in a person-to-person transaction and later find that all notices, disclosures, and records relating to that transaction are to be sent electronically to an email address set up for the consumer by the salesperson.

E-Sign does not permit paper form agreements to be used as the sole method for consumers without computer skills or equipment to agree to electronic disclosures or notices. E-Sign prohibits this by requiring that the consumer's consent must be either given or confirmed electronically. Mere paper consent to receive future electronic notices is not sufficient to permit an electronic notice to replace a legally required paper notice.¹⁹

In the absence of the consumer electronic consent provision of E-Sign, crucial notices which now are required to be physically handed to these consumers would be emailed instead. UETA permits this dangerous scenario to occur.

b. **Danger – Using Product Price *Unfairly* To Persuade Consumer to Accept Electronic Records Instead of Paper.** A consumer walks into a car dealership to buy a car. The salesman says the price for the car is \$10,000, so long as the consumer agrees to accept all records relating to the transaction electronically. The consumer points out he does not have a computer at home or work, and he certainly does not have an email address. The salesman assures the consumer that he can establish a “hotmail” account for the consumer at no cost, and he can access his documents at any public library. He says that as the dealership printer is broken, if the consumer

¹⁸ By the end of this season, it is likely that a majority of states will have passed some form of UETA. The issue of whether the consumer consent provisions of E-Sign apply in those states is a very complicated one, which will not be finally resolved for some time. See, Gail Hillebrand and Margot Saunders, *E-Sign and UETA: What Should States Do Now?* (October, 2000), <http://www.consumerlaw.org>.

¹⁹ E-Sign also has a provision which explicitly states that it does not require anyone to use electronic records. E-Sign § 15 U.S.C. § 7001(b).

insists on paper, the car will be \$500 more, increasing the monthly payments. The high pressure sales tactics work, and the consumer *electronically* signs the contract and financing agreement as UETA would allow. The consumer drives away in his new car without a copy of the signed contract.

There could be two detrimental consequences from this scenario. The first is simply burdensome on the consumer. The second facilitates fraud.

Should it be burdensome to a consumer to access records legally required to be provided? At the least, the consumer will have the significant burden of finding a public access computer with the type of programs necessary to access the internet, access his email account, and open the electronically provided documents sent by the car dealer. The public access computer must also have a working printer. The consumer will then have the burden of figuring out how to access his new email account, opening the documents, and printing them. This is considerably easier to articulate than it is to do. In many public libraries in populous areas, there is often a long wait to use computers with Internet access, and an even longer wait for computers attached to a working printer. This required sequence of efforts is so burdensome that it is likely that many consumers simply will not procure the electronic copy of their paperwork. If and when there is a dispute with the car dealer, or the finance company, – months or years later – then the consumer will try to get a copy of the records. But if the consumer never uses the “hotmail” account, it is likely it will have expired, and the records will no longer be accessible.

Some may ask what is the incentive of the car dealer in this scenario to avoid providing paper to the consumer. The answer is that the laws which require writings to be provided to the consumer generally set out civil penalties for failing to comply with the substantive consumer protections or failing to disclose properly information relating to the transaction. Consumers who do not have the records of these writings cannot file suit in court claiming that the dealer has violated these consumer protection laws.

Should laws facilitating electronic commerce also expedite fraud? The more serious consequence to the consumer is the extent to which the potential for electronic provision of documents eases – even encourages fraud while leaving a consumer without any reasonable means to prove it. In the car dealer scenario described above, when the consumer “signs” the documents electronically at the computer on the car dealer’s desk, the consumer has not necessarily “locked” the document. In a paper transaction, the consumer would pen his name to a piece of paper, either several times, or once with carbon copies being automatically created. The dealer then signs, tears off the consumer’s copy and hands the consumer his copy. The consumer takes that copy away with him when he drives off. But when the consumer electronically signs the contract *at the dealership*, and then the records are sent to his email address by the dealer, the dealer has the opportunity to *change* the electronic record, after the signature was affixed. (There is nothing in E-Sign which requires that the process of electronically signing a record would prevent alteration of that record.)

After the consumer leaves, the salesman could easily change the terms of the electronic contract, for example, by increasing the interest rate or not giving the consumer credit for the trade-in. If the consumer later objects, he has absolutely no basis on which to contest the electronic contract, because the electronic record was not locked when he signed, and he walked away with no paper copies of the agreement that he agreed to. Even if the documents are not altered, providing them electronically makes it much easier to slip onerous terms past the consumer, who may not see the entire document on the screen at the dealership and will not have a paper copy to review.

E-Sign’s consumer electronic consent provisions would prevent both of these scenarios from taking place. E-Sign effectively prohibits this (although this prohibition could be more specific) by requiring electronic consent “in a manner which reasonably demonstrates that the consumer can access information in an electronic form. A consumer who is in a face-to-face transaction should not be able to consent electronically by using the computer equipment belonging to the seller. That consent does not meet E-Sign’s requirements that the electronic consent

demonstrates “that the consumer can access information in the electronic form.” As Senator McCain said, “[t]his should mean that the consumer must initiate or respond to an email to consent or confirm consent.”²⁰ Congressional statements by the sponsors of this legislation indicate that the only rational reading of E-Sign's strict requirements for consent would prohibit this activity.²¹

c. **Danger – Inability of the Consumer to Access or Retain Important Electronic Records.** Under UETA a consumer could agree to receive important documents electronically *mistakenly* believing that the computer the consumer intends to use has a certain program or a certain capacity, only to discover *after* the agreement is made that the consumer is not able to open, read or retain the records. Is there any individual who is not a computer expert who has not received emails with attachments that could not be opened? What if the consumer had agreed to receive his monthly credit card bills in a Word Perfect format, only to discover when the first bill came that his computer could not open these records. When the consumer contacts the provider, he is told that this is the only format that is available, and that if the consumer can't read the statements at home, he will simply have to go to a public access computer each month. This provider may require the use of electronic records, so that the card would be cancelled, and all payments immediately due if the consumer refused to accept electronic records.²²

E-Sign's requirement for electronic consent “in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information” unequivocally protects against this danger. To assure that the consumer actually has access to the necessary hardware and software to access these documents, the consumer consent process should test and assure capacity to receive electronic notices. E-Sign's electronic consent requirement addresses this issue by requiring that the initial consent both be electronic

²⁰ 146 Cong. Rec. S5219-5222 (daily ed. June 15, 2000) (statement of Sen. McCain).

²¹ Subsection (c)(1)(C)(ii) requires that the consumer's consent be electronic or that it be confirmed electronically, in a manner that reasonably demonstrates that consumer will be able to access the various forms of electronic records to which the consent applies. The requirement of a reasonable demonstration is not intended to be burdensome on consumers or the person providing the electronic record, and could be accomplished in many ways. For example, the “reasonable demonstration” requirement is satisfied if the provider of the electronic records sent the consumer an email with attachments in the formats to be used in providing the records, asked the consumer to open the attachments in order to confirm that he could access the documents, and request the consumer to indicate in an emailed response to the provider of the electronic records that he or she can access information in the attachments. . . . The purpose of the reasonable demonstration provision is to provide consumers with a simple and efficient mechanism to substantiate their ability to access the electronic information that will be provided to them.

106th Congress, 146 Cong. Rec. H4352-4353 (daily ed., June 14, 2000) (statement of Cong. Bliley).

²² The ability to insist on electronic records is clearly approved by E-Sign. The consumer must be informed of

the right of the consumer to withdraw consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relations), . . .

15 U.S.C. § 7001(c)(1)(C)(i)(II).

and that it “reasonably demonstrate” the ability to receive notices using the consumer’s existing technology. *Until there is a universal electronic language that every computer can read this protection is necessary.*

IV. Discussion of the confusing status of E-Sign’s provisions in the states.

In an unusual move, Congress permits the federal E-Sign law to be displaced by state action.²³ It is not clear that the displacement of E-Sign works also to displace the consumer protections in E-Sign, because the only legislative history on this issue dictates otherwise.²⁴ But, there is a risk when states take some actions which could work to displace the consumer protections in E-Sign.

E-Sign contemplates two kinds of state legislation on electronic notices and electronic signatures which can displace the federal law. These two kinds of state statutes are: 1) UETA, and 2) other provisions which "specif[y] the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures."²⁵ Nothing prohibits a state from enacting both UETA and companion consumer protection provisions, and indeed the legislative history suggests that this was contemplated.²⁶ The companion provisions must:

- Be consistent with E-Sign
- Specify alternative procedures or requirements for the use or acceptance of electronics records and signatures
- Not favor one technology over another, and
- Make reference to the Federal Act if it is adopted after E-Sign.

To date²⁷ thirty eight states have enacted some version of the Uniform Electronic Transactions Act (“UETA”). This is a Uniform Law on the same subject matter as E-Sign that is recommended by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). A few states have enacted the uniform

²³15 U.S.C. § 7002 (a).

²⁴ “Of course, the rules for consumer consent and accuracy and retainability of electronic records under this Act shall apply in all states that pass the Uniform Electronic Transactions Act or another law on electronic records and signatures in the future, unless the state affirmatively and expressly displaces the requirements of federal law on these points.”146 Cong. Rec. S5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes). It is important to note the close involvement of these three Senators in the passage of E-Sign. Senator Wyden was an original co-sponsor of S. 761, the bill that became E-Sign. Senator Hollings is the ranking member on the Senate Commerce Committee, through which the E-Sign bill passed before it went to the Senate floor. Senator Sarbanes, the ranking member of the Senate Banking Committee, was responsible for holding up the bill before it could be considered by the full Senate because consumers were not adequately protected.

²⁵ 15 U.S. C. § 7002(a)

²⁶See 146 Cong. Rec. S 5229 –5230 (daily ed., June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes) (“These choices for states are not mutually exclusive.”) See also 146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley) (“[S]ome states are enacting or adopting a strict, unamended version of UETA as well as enacting of adopting a companion or separate law that contains further provisions relating to the use or acceptance of electronic signatures or electronic records. Under this Act, such action by the State would prompt both subsection (a)(1) . . . and (a)(2).”)

²⁷May 8, 2001.

version,²⁸ while other states have added consumer protections not found in the uniform version.²⁹

E-Sign and UETA are similar in many respects, but they are not at all similar in the way they treat consumers.

- In consumer transactions, E-Sign requires a specific and *electronic* consent process before an electronic notice may replace a legally required written notice³⁰. UETA merely requires that the parties agree to conduct transactions by electronic means, but does not specify how that agreement is to be proven. Instead, UETA states that agreement is determined from the context and circumstances.³¹ This could allow, for example, a paper contract with the agreement to transmit notices and documents electronic *included in the fine print*.
- E-Sign exempts certain important consumer notices from the possibility of electronic delivery.³² UETA does not exempt any categories of consumer notices.
- E-Sign prohibits oral records to be used for consumer records.³³ UETA does not.
- E-Sign has clearer and more protective language for record retention and the integrity of electronic records replacing written records (note these provisions are not limited to consumers).³⁴

UETA alone is worse for consumers than E-Sign on all major aspects except perhaps UETA's recognition that state agencies can impose added requirements on retained records subject to the agency's jurisdiction. The passage of E-Sign removes the key reason for states to enact UETA—to facilitate nationwide acceptance of electronic notices and electronic signatures. Thus, a state might wisely choose not to enact UETA in light of E-Sign. However, the National Conference of Commissioners on Uniform State Laws, UETA's author, has representatives in every state who are expected to continue to seek to enact UETA. If UETA is enacted at all, it should be enacted in a way that does not "modify, limit, or supersede" the consumer protections of E-Sign. Ideally, in the same bill as UETA, it should be accompanied by a companion consumer protection act.³⁵

²⁸For information on the status of UETA's passage in the states, see <http://www.uetonline.com>. This site, however, does not list or describe the nonuniform amendments. For the uniform text and comments, see <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>. For a discussion of the nonuniform variation by state, see <http://www.bmck.com/ecommerce/uetacomp.htm>.

²⁹Some states also have other laws affecting electronic signatures or electronic records. These laws are preempted to the extent they violate E-Sign's prohibitions against "procedures or requirements that require or accord greater legal status or effect to . . . a specific technology . . .": E-Sign 15 U.S.C. § 7002(a)(2)(A)(ii).

³⁰ 15 U.S.C. § 7001(c).

³¹ UETA §5.

³² 15 U.S.C. § 7003(b).

³³ 15 U.S.C. § 7001(c)(6).

³⁴ 15 U.S.C. § 7001(d) and (e).

³⁵For example, North Carolina passed extensive consumer protections in its UETA, N.C.G.S. § 66-308.16; as did West Virginia, *see* 2001 West Virginia Senate Bill 204. Connecticut has a bill on UETA pending with extensive consumer protections included in it, *see* 2001 Connecticut House Bill No. 5925, as does Massachusetts, 2001 Massachusetts Senate 1803.

a. Status in States which Enacted UETA Prior to E-Sign's Effective Date

The following states enacted some version of UETA prior to the enactment date of E-Sign – June 30, 2000

Arizona	California	Florida	Hawaii	Idaho
Indiana	Iowa	Kansas	Kentucky	Maine
Maryland	Minnesota	Nebraska	Ohio	Oklahoma
Pennsylvania	Rhode Island	South Dakota	Utah	Virginia

E-Sign should apply in all states that had previously passed UETA – both uniform and non-uniform – as well as any other law legalizing electronic records and electronic signatures. This means that – at the least – **on all issues that are addressed in E-Sign, E-Sign is the prevailing law.** For the purposes of consumer protection, the provisions of E-Sign's sections 7001(c), (d) and (e), should apply in all those states. The question of whether any part of the pre-E-Sign state law is still in effect after E-Sign needs to be addressed separately;³⁶ but will essentially turn on the extent to which the pre-E-Sign law was a completely uniform version of UETA, or otherwise consistent with E-Sign.³⁷

E-Sign's legislative history establishes that state statutes passed prior to E-Sign do not displace it. Statements by the bill sponsors and other members closely involved with the passage of E-Sign bill indicate it was Congress' intent that E-Sign could be displaced (in part) only by a *post-E-Sign* state statute:

A state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supersede or displace the requirements of section 101.³⁸

Congressman Bliley, the original sponsor of the E-Sign bill in the House,³⁹ and the Chair of the Conference Committee on E-Sign, emphasized that prior passage of a state law does not eliminate the application of E-Sign in a state:

³⁶ For an extensive discussion on the preemption and displacement issues relative to E-Sign and UETA, see Gail Hillebrand and Margot Saunders, *E-Sign and UETA: What Should States Do Now?* September, 2000. http://www.consumerlaw.org/e_sign.html.

³⁷ UETA's proponents suggest that even if all or many of the nonuniform parts of an enacted UETA are preempted, the uniform parts survive, transforming a nonuniform UETA into a uniform one. This argument turns the insistence of state legislatures on non-uniform UETAs on its head. Nonuniform UETAs were enacted in states that were originally offered the uniform UETA. Those state legislatures deliberately refused to pass UETA without changes, generally to protect consumers. If those state legislatures had found UETA adequate without the nonuniform consumer protection additions, then they could have simply enacted the uniform version. The fact that state legislators made nonuniform changes to UETA is strong evidence that those legislators did not intend the uniform version of UETA to become law in their states. See, Patricia Brumfield Fry, "A Preliminary Analysis of Federal and State Electronic Commerce Laws UETA Online." <http://www.uetonline.com/docs/pfry700.html>. Yet, it is hard to see how a state enactment of UETA which occurred prior to E-Sign could displace E-Sign.

³⁸ 146 Cong. Rec. S5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes).

³⁹ H.R. 1714, 106th Cong., 1st Sess (1999).

[A] State could not argue that section 101 does not preempt its statutes, regulations, or other rules of law because they were enacted or adopted prior to the enactment of this Act. . . .⁴⁰

Logic also supports the conclusion that prior statutes do not displace E-Sign. E-Sign and prior state UETAs can coexist without either being displaced. A merchant dealing with a consumer can comply with both the general rules of UETA and the more specific E-Sign consumer protections. In addition, it would be extremely odd for a UETA enacted before E-Sign to displace the subsequent federal statute. If Congress had wanted prior uniform UETAs to displace E-Sign, it could have made E-Sign applicable only in states lacking a uniform UETA. It did not do so. Thus, a state may only displace E-Sign with legislation enacted after E-Sign that meets either of the two tests set forth in E-Sign.⁴¹

b. Post E-Sign Passage

Since E-Sign was passed, at least six states have passed UETA specifically preserving the consumer protections in E-Sign:

New Jersey	Nevada	North Carolina
West Virginia ⁴²	Tennessee	Texas

The following states have passed UETA after E-Sign without specifically addressing the federal consumer protections:

Alabama	Arkansas	Delaware	Louisiana	Michigan
Mississippi	Missouri	Montana	New Mexico	North Dakota
Wyoming				

UETA has been introduced in the state legislatures of the following states (the states with the asterisk are revisiting some issues):

California*	Colorado	Connecticut	District of Columbia	
Massachusetts	Illinois	Missouri	Nevada	
New Hampshire	North Carolina*	Oregon	Vermont	Wisconsin

So far as we know, to date UETA is not on the table in the following five states:

Alaska	Georgia	New York	South Carolina	Washington
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The bottom line here is that there will be substantial confusion in many states regarding the question of whether the E-Sign consumer consent provisions. That is unnecessary and should be resolved.

V. The effect of the differences between *electronic* delivery and *paper* delivery on electronic records.

⁴⁰ See 146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley).

⁴¹ E-Sign 15 U.S.C. § 7002(a)(1) or (2).

⁴² North Carolina and West Virginia's versions add some additional consumer protections as well.

The use of electronic delivery mechanisms has certainly changed the way many people communicate and exchange information. Electronic mail is an extraordinarily useful means of transferring ideas, conducting transactions, and conveying facts and proposals to large numbers of people easily and instantaneously. Electronic communication is undoubtedly changed the way commerce -- business as well as personal -- is conducted.

Electronic communication is faster, cheaper, more adaptable and more secure in many instances than physical world delivery. The benefits of electronic communication are extensive, and are still being discovered. It does not diminish the extensive benefits of electronic communication, however, to articulate the differences between electronic delivery and physical world delivery. Nor should it diminish the benefits to illustrate the dangers of assuming both methods of communications are equally reliable in all contexts.

The differences between electronic and physical world communications must be recognized, both to enhance the future improvement of electronic communication, and to ensure that individuals who do not have the same degree of access to electronic communications are not penalized for this lack of access. We welcome the continued increase and reliance upon electronic communications. *We caution only against blind assumptions that the two forms of communications are equivalent.* Despite the extensive list of benefits of electronic delivery over physical world, there are incontrovertibly still some differences between the two which dictate that the law not treat them in identical fashions. (These differences are described in Part III above).

Without question, electronic communication provides wonderful opportunities, but it cannot be assumed to be as reliable a method to receive essential information as postal delivery for the general public. **A 10% drop off rate indicates that in any one year, 1 out of 10 households which has Internet access the previous year will no longer be able to receive electronic communications.**⁴³

As the Department of Commerce has noted in its report, the drop off rate was higher among households at lower incomes. This should come as no surprise. Also, we can assume that households at lower incomes will continue to have less stable access to electronic commerce in the future. It is very important that the U.S. Government continue to require that access to essential information not be determined by one's wealth. Receipt of mail through the U.S. Post Office has always been free. Until electronic commerce reaches the same degree of universal access as the U.S. Postal Service does, the law should treat electronic delivery and physical world delivery of records differently.

VI. Recommendations to improve protection of consumers from risks imposed by electronic exchanges.

Consumer Consent Provisions Should be Nationwide. Given the confusion regarding the application of E-Sign's rules in various states, we recommend that Congress mandate the consumer consent provisions be provided on a nationwide basis. As E-Sign might be read to allow states to opt out of the consumer consent provisions, the possibility of non-uniformity is likely. This will require internet sellers to comply with different rules in different jurisdictions. It also potentially hampers the growth of e-commerce, by failing to provide the assurances of privacy and financial security that are the basis of consumer confidence. The consumer consent provisions should be made a uniform and nationwide standard, just as the Truth in Lending Act provides a uniform nationwide standard for consumer credit transactions.

Assurances of Receipt Should be Required for Electronic Delivery. Assume that a financially savvy consumer shops for the best health insurance on-line. The consumer finds that the most economical product requires

⁴³U.S. Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, *"Falling Through the Net: Toward Digital Inclusion" A Report on Americans' Access to Technology Tools,* October, 2000, Part One -- Overall Household Findings.

that all communications between the insurance company, the consumer, and the medical providers be conducted entirely electronically. So, this consumer agrees to receive notices regarding his health insurance on-line. However, a year later, the consumer's computer breaks, and he is not in a financial position to purchase a new one.⁴⁴ He does not have access to the Internet at work, and his obligations at work and to his family make it difficult for him to take the time it requires to go to a public access computer and wait to use the computers connected to the Internet. He also relies on his understanding that any notice of cancellation of insurance will be mailed to him.⁴⁵ As a result, when the insurance company decides to change its coverage policies of dependents and notifies all policy holders this consumer never gets his notice and is unknowingly left without insurance.

Both the Federal Electronic Signature Act,⁴⁶ and the state laws on electronic records -- the Uniform Electronic Transaction Act -- fail to fully address the significant differences between the ease and lack of cost involved in receiving mail through the U.S. Postal Service, and the complexities, ongoing expense, and uncertainties involved with receiving email. The problems experienced with e-mail are not unique to individuals. Even corporate email systems seem to break down fairly frequently. Until email reaches at least the degree of reliability of the U.S. Postal Service, care must be taken to assure that consumers actually receive important information that is sent electronically.

There are many technological advantages to creditors and consumers alike from electronic delivery of notices. One of these advantages is that there are numerous technological methodologies which enable the sender of an electronic record to determine if the recipient of the record actually accessed it.⁴⁷ The program built into the ubiquitous Microsoft Outlook which allows senders to ascertain that emails have appeared on the recipient's screen, is just one of a multitude of similar technologies.⁴⁸

⁴⁴ The reason this consumer no longer has access to the Internet thus could fall into one of three categories in the Digital Divide's survey: "no longer owns computer" (17%); "computer requires repair" (9.7%); or "cost, too expensive" (12.3%).

⁴⁵ Notice of cancellation of health insurance is exempted from the electronic record provisions of Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7003(b)(2)(C). However, even this provision may not apply in a state that has superceded the provisions of E-Sign by passing a law which meets the requirements of 15 U.S.C. § 7002(a)(1) or (2).

⁴⁶ Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, *et. seq.* 2000.

⁴⁷ Just a few examples of the available technology include:

<http://www.readnotify.com/>
<http://www.electradoc.com/emailetes.html>
<http://www.drakken.com/email.htm>
<http://www.cs.bc.edu/~osbornk/reply/>
<http://www.greenbaycd.com/emailp.html>
<http://www.slipstick.com/addins/auto.htm>
<http://www.msbcd.com/cds4sale/23246.html>

⁴⁸ *For example*, in just one of the dozens of websites which listed software that provided automatic acknowledgment of a recipient's opening of an email (http://www.sharewareplace.com/file_pc/int_mail.htm) the following was explained:

Description: The G-Lock EasyMail was developed to help people run and manage mailing lists, newsletters, announcement lists and customer updates and other legal uses. G-Lock EasyMail is a powerful group mailer which sends your message directly from your outbox to the recipient's mail

E-Sign's requirement for electronic consent provides only an imperfect protection against this danger. Requiring the consumer to go through the exercise to test his computer's capacity to access the information that will be provided henceforth electronically, at least alerts the consumer to the significance of the agreement to receive all records in the future via an electronic mechanism. A better protection against this particular danger would be statutory language as follows:

Notices required to be provided, sent or delivered to a consumer shall be considered received only when the notice itself is opened, acknowledged, or automatically acknowledged by a flag that tells the sender it has been opened.⁴⁹

The recommended language gives three ways to trigger effectiveness of a notice: 1) actual opening; 2) manual acknowledgment; or 3) a technological automatic acknowledgment received by the sender.⁵⁰

If there is a fairly easy and inexpensive way to ensure that consumers actually receive this information, especially when ongoing access to electronic notices remains an expensive and illusive proposition for the majority of households in the nation,⁵¹ that methodology should be required.

VII. Conclusion

There are extensive benefits of electronic communication -- many of which provide more convenience, more flexibility, and less cost to all parties. However, these marvelous attributes do not mean that electronic communication provides the same degree of reliability and equal access that is provided by physical world delivery. We hope that the report written by the Department of Commerce recognizes the significant differences between real world communications and electronic commerce.

It is very important that U.S. Government continue to require that access to essential information *not* be determined by one's wealth. Receipt of mail through the U.S. Post Office has always been free. Until electronic commerce reaches the same degree of universal access as the U.S. Postal Service does, the law should treat electronic delivery and physical world delivery of records differently.

server (without using any ISP's SMTP server). This takes the load off of your mail server and speeds up message sending significantly. It gives instant confirmation of delivery by checking the address before it sends, which eliminates the dreaded "Mail undeliverable" messages you can get. It can also get confirmation that your message has been read.

⁴⁹ Because of the fear of the spread of a virus, many people are afraid to open attachments. Required notices should only be included in the body of the email.

⁵⁰ We recommend that, as an additional question to be addressed, the FTC and the Department of Commerce seek information about the cost, availability, and effectiveness of technological automatic acknowledgment systems.

⁵¹ Only 41.5% of all households can access the Internet from their home. U.S. Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, *"Falling Through the Net: Toward Digital Inclusion" A Report on Americans' Access to Technology Tools,* October, 2000. Figure II-13.